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No. 98-263

In The

Supreme Court of the United States

October Term, 1997

PETER TISCHMANN,

Petitioner,

vs.

ITT/SHERATON CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The correct name of the Respondent is ITT Sheraton Corporation. Respondent is an indirect, wholly-owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc. ("Starwood"). Starwood owns a substantial stock interest in ITT Educational Services, Inc., a publicly traded corporation. Respondent also owns a majority stock interest in CIGA, SpA.

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INTRODUCTION

Peter Tischmann's ("Tischmann" or "Petitioner") Petition for a Writ of Certiorari requests that this Court review that portion of the Second Circuit's decision which held that Tischmann was not entitled to a jury trial of his claim for severance benefits under an ERISA-governed employee benefit welfare plan. In so deciding, the Second Circuit relied upon its prior holding in *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1258-59 (2d Cir. 1996) that, "there is no right to a jury trial in suit brought to recover ERISA benefits." The Second Circuit also relied on its holding in *DeFelice v. American Int'l Life Assurance Co. of New York*, 112 F.3d 61, 64 (2d Cir. 1997) which reaffirmed that, "*Sullivan* made clear that cases involving ERISA benefits are inherently equitable in nature, *not contractual*, and that no right to a jury trial attaches to such claims." (Emphasis supplied).

In his Petition, Tischmann attempts to create a conflict among the circuit courts where none exists. In support of his claims, Tischmann cites *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 883 (6th Cir. 1997) which held that plaintiffs seeking, "damages in the form of loss of benefits, the cost of premiums incurred . . . expenses incurred in purchasing private coverage, and/or the cost incurred of medical bills" were not entitled to a jury trial. Tischmann also cites *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323-24 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), which denied plaintiff's request for a jury trial and held that plaintiff's request for monetary relief with respect to some claims did not alter the equitable nature of the action or compel the conclusion that plaintiff was entitled to a jury trial. Finally, Tischmann references *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 829 (10th Cir. 1995) which reviewed *de novo* the District Court's denial of plaintiff's request for a jury trial of her ERISA claims. The Court affirmed the denial of a jury trial noting that

at least eight circuits had held that there is no such right. As shown below, the circuit court cases relied on by Tischmann are consistent with the holding of the Second Circuit and with the holdings of all of the other circuits on this issue and no conflict exists for this Court's consideration.

Tischmann also claims that the Second Circuit failed to follow the precedent of this Court for determining when a litigant's Seventh Amendment right to a jury trial attaches. As shown below, the Second Circuit's decision in the case at bar followed its own precedent and the precedent of the other circuits and is consistent with the precedent of this Court as Petitioner's claim for ERISA benefits is equitable in nature. Therefore, a lengthy analysis by the Second Circuit was unnecessary.

Tischmann also claims that the Second Circuit's decision conflicts with this Court's decision in *Feltner v. Columbia Pictures Television, Inc.*, __ U.S. __, 118 S. Ct. 1279 (1998). *Feltner*, however, has no bearing whatsoever on the issues presented by the Petition as it involved an action at law for statutory damages. The District Court and the Second Circuit found that Tischmann sought equitable relief in the form of recovery of severance benefits to which he claimed to be entitled under the ITT Special Executive Severance Pay Plan ("ITTSESPP" or the "Plan"). Petitioner does not challenge the holdings of the District Court and the Second Circuit that the ITTSESPP is an ERISA-governed Plan. Thus, *Feltner* is inapposite.

Finally, Tischmann asserts that this Court must determine whether ERISA permits or requires a jury trial for benefit claims. It is respectfully submitted that as this Court has already determined that a jury trial is not available for equitable claims and as Tischmann does not challenge the factual determination below that his claim is one to recover benefits under an ERISA

plan, there is no dispute that his claim is equitable, not legal, in nature.

COUNTER-STATEMENT OF THE CASE

At the time of his termination, Tischmann was the Vice President and Managing Director of the St. Regis Hotel, Sheraton's flagship hotel in New York City. (B-3).[1] On March 12, 1992, following an investigation of allegations that Tischmann sexually harassed the Director and Assistant Director of Human Resources for the St. Regis, Sheraton terminated Tischmann's employment for cause. (A-4).

At the time of his termination, Tischmann was a participant in the ITTSESPP, an employee benefit welfare plan created in 1989 by Sheraton's parent corporation, ITT Corporation, to provide severance benefits for a class of executives within the organization. (A-3-4). Under the terms of the Plan, a participating executive would be entitled to two years severance pay and, under certain conditions, other benefits, provided the executive fulfilled the terms and conditions specified in the Plan instrument. (A-3-4, Joint Appendix Vol. II, p. 777).[2] The Plan specifically provided that severance benefits would not be paid if the executive's employment was terminated for "cause." (A-3, Joint Appendix Vol. II, p.777). Although the Plan instrument did not specifically define "cause," the Plan gave the administrator broad discretion and the exclusive right to interpret the Plan, adopt any rules and regulations and decide any and all matters arising under the Plan, including the right

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1. Unless otherwise noted, citations are to the Appendix attached to Tischmann's Petition. Citations denominated as "A" reference Appendix A, and those denominated as "B" reference Appendix B, etc.

2. Citations to the Joint Appendix refer to the Joint Appendix filed in connection with the appeal to the Second Circuit.

to determine appeals. (B-8). The Plan also provided that, "[s]ubject to applicable Federal and state law, all interpretations and decisions by ITT [the administrator] shall be final, conclusive and binding on all parties affected thereby." (Joint Appendix Vol. II, p.780).

In its decision rendered after a twelve day trial, the District Court concluded as to Sheraton's decision to terminate Petitioner for cause that, "as a simple matter of business interest, it is difficult to imagine that the company could do anything less drastic once it concluded that the charges were well-founded." (B-52). The District Court also concluded that it would have reached the same result even if it were to review the administrator's decision under the more searching *de novo* standard. (B-69).

THE INSTANT ACTION

A. The Petition Misrepresents the Nature of Tischmann's Claims in the District Court

In his effort to convert his claim for ERISA benefits into an alleged breach of contract action for damages, Petitioner attempts to conceal the fact that his Amended Complaint, filed on March 3, 1993, eleven months after the filing of the original Complaint, invoked the jurisdiction of the District Court based on 28 U.S.C. § 1331 (Federal Question) and 29 U.S.C. § 1132(a) (ERISA) as well as diversity jurisdiction as mentioned in the Petition. Paragraph 1 of the Amended Complaint alleges, *inter alia*, that, "Tischmann also seeks payment of severance and pension benefits wrongfully withheld from him in violation of the Employee Retirement Income Security Act of 1974." (Joint Appendix Vol. 1, p.12). As such, Petitioner cannot now maintain that his claims were never more than a simple request for monetary relief.

In April 1994, Sheraton moved for summary judgment dismissing the Amended Complaint which contained eleven claims for relief including (1) breach of contract (First Claim); (2) breach of an implied covenant of good faith and fair dealing (Second Claim); (3) wrongful discharge (Third Claim); (4) intentional infliction of emotional distress (Fourth Claim); (5) negligent infliction of emotional distress (Fifth and Seventh Claims); (6) breach of promise to pay severance and pension benefits (Sixth and Eighth Claims); (7) denial of wages under New York Labor Law § 190 *et seq.* (Ninth Claim); (8) slander (Tenth Claim); and (9) compelled self-publication defamation (Eleventh Claim). (C-12-13).

The District Court granted Sheraton's Motion except as to Tischmann's Sixth and Eighth Claims for breach of promise to pay severance benefits and his Ninth Claim for denial of wages under the New York Labor Law. (C-23, 27-28). In the course of ruling on Tischmann's claim for severance benefits under the ITTSESPP, the District Court initially held that the Plan was not an ERISA plan. (C-27).

THE TRIAL

This case was tried before Magistrate Judge Michael H. Dolinger pursuant to 28 U.S.C. § 636(c). Prior to the commencement of trial, Sheraton moved for reconsideration of the District Court's prior ruling that the ITTSESPP was not an ERISA plan and that Tischmann's claims under the New York Labor Law were not, therefore, preempted by ERISA. Sheraton's application was the subject of a telephone conference among the parties and the Court and was subsequently addressed by the District Court on the record prior to the start of trial. The Court advised the parties at that time that Sheraton's request would be taken under advisement and that the case would be tried to a jury. The Magistrate Judge advised counsel that the Court,

> [would] be prepared to issue separate alternative findings, if necessary, to deal with the concern that this or some aspects of this case should properly be for the Court rather than the jury to decide.

(Joint Appendix Vol. 1, p. 477).

Subsequent to the jury's special verdict in favor of Tischmann on the question of whether Sheraton's conduct was arbitrary or in bad faith, and in favor of Sheraton on the question of whether Sheraton's conduct was "willful," the District Court granted Sheraton's motion for reconsideration of the law of the case and determined that the ITTSESPP is an ERISA plan, that ERISA governed Tischmann's claim for severance benefits, that ERISA preempted Tischmann's claims under the New York Labor Law and that Tischmann was not entitled to a jury trial of his claim for ERISA benefits based on Second Circuit precedent. (A-7, B-12, 15, 24-25). The District Court went on to render its own decision in favor of Sheraton holding that the denial of severance benefits was neither arbitrary nor capricious and that, even if Sheraton's actions were reviewed on a *de novo* basis, the Court would reach the same result. (B-53, 69). The District Court also found that ERISA preempted Tischmann's claim under the New York Labor Law or, in the alternative, that the denial of benefits was justified. (A-7, B-72).

THE APPEAL TO THE SECOND CIRCUIT

On appeal to the Second Circuit, Tischmann contended that the ITTSESPP was not an ERISA plan and that, even if it were, he was entitled to a jury trial. The Second Circuit affirmed the District Court's holding that the ITTSESPP is an ERISA plan and, citing its recent holdings in *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251 (2d Cir. 1996) and *DeFelice v. American Int'l Life Assurance Co. of New York*, 112 F.3d 61

(2d Cir. 1997), held that Tischmann was not entitled to a jury trial because of the equitable nature of his claims. (A-19-21).

The Petitioner now claims that he contended before the Second Circuit that, even if the ITTSESPP were found to be an ERISA-governed plan, his state law claims would not be preempted by ERISA. However, the Second Circuit in its opinion observed that,

> [b]oth sides agree that if the ITTSESPP is an "employee welfare benefit plan" within the meaning of ERISA, then Tischmann's state law claim for severance benefits is preempted by ERISA . . .

(A-8). The Court also observed that, "Tischmann does not contend that he is entitled to relief under the New York Labor Law if the ITTSESPP is an ERISA-governed plan." (A-9, n.2). Thus, Tischmann should be precluded from arguing to this Court that his Labor Law claims are not preempted.

In light of their affirmance of the District Court's decision, the Second Circuit noted that they need not address the arguments raised by Sheraton's Cross-Appeal. (A-21, n.5). Sheraton raised three issues of law on appeal which would be subject to possible review by this Court should this Petition be granted. First, Sheraton contended that the District Court erred in denying its motion for judgment as a matter of law under Fed. R. Civ. P. 50. Second, Sheraton contended that, in the alternative, it was entitled to a new trial to prevent a miscarriage of justice. Third, Sheraton contended that, assuming *arguendo* that the Plan is not governed by ERISA, Tischmann does not have a substantive claim under Article 6 of the New York Labor Law.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE SECOND CIRCUIT IS IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS TO THE EFFECT THAT THERE IS NO RIGHT TO A JURY TRIAL IN A SUIT BROUGHT TO RECOVER ERISA BENEFITS

This Court has stated that a Petition for a Writ of Certiorari will be granted only for compelling reasons as when a decision by a United States Court of Appeals creates a conflict among the circuit courts on some important matter, or decides an important question of federal law that should be settled by this Court, or decides a question in a way that conflicts with relevant decisions of this Court. (Sup. Ct. R. 10).

A. There Is No Conflict Among The Circuits

As noted above, Petitioner seeks to create a conflict among the circuit courts where none exists. The Second Circuit correctly held that because Tischmann's claim was one to recover severance benefits under an ERISA-governed plan, he had no right to a jury trial. (A-20-21). In so doing, the Second Circuit followed its own precedent in *Sullivan* and *DeFelice* and observed that its holding was consistent with the precedent of every other circuit court that had considered the question.[3]

3. *See Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir. 1990), *cert. denied*, 498 U.S. 811 (1990); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985); *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995); *Calamia v. Spivey*, 632 F.2d 1235, 1236-37 (5th Cir. 1980); *Sprague v. General Motors Corp.*, 133 F.3d 388, 406 (6th Cir. 1998), *cert. denied*, 118 S. Ct. 2312 (1998); *Bair v. General Motors Corp.*, 895 F.2d 1094, 1097 (6th Cir. 1990); (Cont'd)

Each had ruled that there is no right to a jury trial in suits brought pursuant to ERISA § 502(a)(1)(B). Indeed, *Sullivan* and *DeFelice* both cite to the Fifth Circuit's decision in *Borst* in support of their holdings. As noted above, both *Borst* and the Sixth Circuit's decision in *Bittinger* concluded that where, as here, an equitable assessment must be made in order to provide or deny the relief requested, the analysis is performed by the Court and not by the jury. This is confirmed by the Tenth Circuit's assessment in *Zimmerman* which also denied a jury trial where equitable issues predominated.

In fact, Tischmann's citation to these cases, and to the District Court opinions referenced in his Petition, reinforces and supports the Second Circuit's analysis in the instant action as the Second Circuit performed an assessment similar to that performed by the other Courts and reached a similar result. Contrary to Tischmann's assertions, the Second Circuit did not flatly preclude all jury trials; rather, as its sister circuits found, the Second Circuit held that jury trials are not available when the relief sought is inherently equitable. As such, it is respectfully submitted that no justiciable conflict exists to invoke this Court's consideration.

(Cont'd)

Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988), *cert. denied*, 488 U.S. 826 (1988); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466, 468 (7th Cir. 1998); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Williams v. Southwestern Bell Corp.*, 124 F.3d 209 (8th Cir. 1997); *In Re Vorpahl*, 695 F.2d 318, 319-22 (8th Cir. 1982); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706-07 (9th Cir. 1998), *petition for cert. filed*, (U.S. Sept. 10, 1998) (No. 98-432); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Andrade v. Parsons Corp.*, 972 F.2d 1336 (9th Cir. 1992); *Hunt v. Hawthorne Assoc., Inc.*, 119 F.3d 888, 907-08 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1800 (1998); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1566-67 (11th Cir. 1987).

II.

THE DECISION OF THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE HOLDINGS OF THIS COURT

Petitioner seeks to fabricate a conflict between the decision of the Second Circuit and the precedent of this Court. The Petition raises three alleged conflicts, none of which withstands scrutiny.

A. The Second Circuit Did Not Ignore This Court's Standard For Determining Whether A Litigant's Seventh Amendment Right To A Jury Trial Attaches To A Claim

The Second Circuit had no need to address at length the question of whether Tischmann was entitled to a jury trial of his claim to recover severance benefits under an ERISA-governed plan as the Court had recently considered the question in depth in both *Sullivan* and *DeFelice*.

In *DeFelice,* the plaintiff contended that her claim for benefits under ERISA § 502(a)(1)(B) was, "more properly characterized as a legal claim for breach of contract, with the relief of money damages, and that she therefore ha[d] an absolute right to trial by jury under the Seventh Amendment."[4] *DeFelice*, 112 F.3d at 64. In rejecting plaintiff's argument, the Second Circuit took cognizance of and performed the analysis promulgated in both *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989). *See DeFelice*,

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4. This is the very same argument made by Petitioner to this Court and in the Second Circuit.

112 F.3d at 64. In support of its decisions in *Sullivan* and *DeFelice*, the Second Circuit further cited as precedent *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323-24 (5th Cir. 1994) in which the Fifth Circuit undertook a substantial analysis of the *Terry* test in concluding that plaintiff's ERISA claims, including those for monetary relief, were equitable in nature and not a proper subject for a jury's consideration.

Tischmann erroneously asserts that the Second Circuit failed to conduct the reasoning required by the precedent of this Court in both *Tull* and *Terry*. (Petition, p.23). As an initial matter, Tischmann overstates the relief that application of the *Tull/Terry* test provides. Contrary to Petitioner's assertion, relief in the form of a jury trial is not automatically available under this analysis merely because Congress is silent on the issue in a given legislative enactment. Rather, the *Tull/Terry* analysis requires exactly what the Second Circuit did below, namely an assessment of the nature of the remedy sought.

Indeed, even if one assumes that the Second Circuit failed to strictly apply the format of the *Tull/Terry* test, it is incontrovertible that the Court below performed a functionally equivalent analysis that reached a comparable result, namely that the remedy sought herein is a reassessment of the Plan administrator's inherently equitable decision-making powers which analysis is more properly performed by the Court than the jury. Contrary to Tischmann's continued assertion, his claim is not a contract claim, is not a wage claim, and is not inherently legal simply because it may be satisfied through the payment of money. Tischmann seeks more than a money judgment against Sheraton; he seeks a judgment that the Plan administrator erroneously exercised its discretion, which assessment is inherently equitable in nature.

Implicit in these erroneous assertions proffered by Petitioner is Petitioner's continued reliance on the characterization of the Plan as a severance contract. However, Tischmann does not appeal or challenge the holding of the Second Circuit that the ITTSESPP is an ERISA plan. Thus he cannot argue in this Court that the Plan is a contract. It is respectfully submitted, therefore, that Petitioner's attempt to bootstrap additional state law claims and characterizations into an analysis of the right to a jury trial under ERISA must be rejected when such claims have been held to be preempted and that holding is unchallenged.

B. The Second Circuit Did Not Ignore The Implications Of *Firestone* In Deciding That Tischmann Was Not Entitled To A Jury Trial

Petitioner argues that *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), which provided a *de novo* standard of review of the actions of ERISA administrators under certain circumstances, wholly eliminated the rationale used by some circuit courts to deny jury trials in ERISA benefits cases. Contrary to Petitioner's assertion, however, *Firestone* did not eliminate the arbitrary and capricious standard of review; rather, it required an additional analysis *by the Court* when a conflict of interest exists. Such an additional requirement has no bearing on the inherently equitable relief sought by benefit claimants, it merely requires a more searching analysis *by the Court* of the facts underlying the Plan administrator's exercise of its equitable powers.

Indeed, the Second Circuit considered and reconciled the impact of *Firestone* in both *Sullivan* and *DeFelice*. In the case at bar, the District Court also considered the impact of *Firestone* on the standard of review to be applied to the actions of the ERISA administrator. In fact, although the District Court

concluded that the administrator was nevertheless entitled to be judged by the "arbitrary and capricious" standard of review under *Firestone*, it ruled, in the alternative, that even under the stricter *de novo* standard, the decision of the administrator to deny severance benefits was justified and would be sustained. (B-31, 69). As noted above, this factual determination remains unchallenged by Petitioner.

Accordingly, if the Petitioner were correct in arguing that *Firestone* changes the jury trial equation in certain cases, that argument would not affect the decision in this case thus obviating consideration of the issue by this Court.

C. The Second Circuit's Decision Is Not In Conflict With *Feltner* And Does Not Deprive Petitioner Of Any Constitutionally Protected Right To A Jury Trial

The Second Circuit decision stands squarely for the limited proposition that there is no right to a jury trial in a suit brought to recover ERISA benefits because such cases are inherently equitable in nature, not contractual. (A-20-21). As shown above in Point I, every circuit court which has considered this question has arrived at the same answer. In the case at bar, the ITTSESPP was created in 1989, fifteen years after the enactment of ERISA. Thus, because ERISA preceded creation of the ITTSESPP, the rights and obligations created by ERISA, including the statutory remedies, were part and parcel of the Plan from its inception. In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) this Court recognized that the carefully integrated civil enforcement provisions of § 502(a) of ERISA provide,

> strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect

> upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

(Citation omitted, emphasis in the original).

In the face of this clear intent on the part of Congress to provide specific remedies to ERISA beneficiaries in lieu of all other possible remedies, Petitioner argues that his claim for benefits is really the statutory equivalent of a common law action for damages. Had Congress intended to provide a statutory damage remedy for a failure to pay ERISA benefits, surely it would not have done so *sub silentio* Furthermore, Tischmann's assertion that ERISA provides for jury trials merely because it protects and expands existing protections assumes the pre-existence of a jury trial for equitable matters, which assertion cannot be sustained under the precedent of this Court. Tischmann acknowledges his lack of support for this argument, as he must, and specifically notes that the legislative history of ERISA does not compel a finding that a right to a jury trial previously existed. (Petition, p.25). Tischmann's further assertion of a clear-cut prior practice of providing jury trials under these circumstances is also wholly unsupported. (Petition, p.27). The actual precedent cited above has specifically found that there has never been a right to jury trial of matters in equity. Accordingly, as Petitioner's claim remains one for equitable relief, it is solely the province of the Court.

Petitioner's reliance on *Feltner v. Columbia Pictures Television, Inc.*, __ U.S. __, 118 S. Ct. 1279 (1998) is misplaced. In *Feltner*, this Court held that the Seventh Amendment provides a right to a jury trial on all issues pertinent to statutory damages under § 504(c) of the Copyright Act, including the damage amount itself. *Feltner*, 118 S. Ct. at 1288. In the case

at bar, the remedy provided by statute is not damages; rather, the statute provides that a participant or beneficiary may bring an action to recover benefits due under the terms of a plan. Such a remedy is equitable in nature and no right to a jury trial attaches. This is particularly apparent where, as in the instant action, the administrator or fiduciary has broad discretion to determine eligibility for benefits or to construe the terms of the plan, and the court has determined that the "arbitrary or capricious" standard of review applies. *Sullivan*, 82 F.2d at 1255.

The circumstances of the instant action are more appropriately compared to the circumstances addressed by this Court in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) where this Court recognized that certain claims are inappropriate for determination by juries. In *Markman*, this Court addressed the specific question of whether construction of a patent claim was an issue for the court or for a jury. In concluding that it was an issue for the court, this Court reasoned that a judge, by training and discipline, is more likely to correctly interpret complex documentation, such as patent instruments, which underlies certain statutory claims. *Markman*, 517 U.S. at 388-89. This Court also reasoned that construction of complex statutory elements, such as patent terms, by a court would lead to greater uniformity of result. *Id.* at 390. The Second Circuit undertook a similar analysis in *Sullivan* and concluded that given the fact that courts have almost uniformly held that proceedings to determine rights under employee benefit plans are equitable in nature, judges are better suited than juries to apply the "arbitrary and capricious" standard and the "presumption of correctness" that attaches to private administrative action. *Sullivan,* 82 F.2d at 1258-59.

As no constitutionally protected right attached to Petitioner's equitable claim for severance benefits and as the

District Court, as affirmed by the Second Circuit, was accordingly well within its rights to make the benefit assessment without submission to the jury, it is respectfully submitted that no further consideration need be given to Petitioner's claims by this Court.

III.

AS CLAIMS FOR ERISA BENEFITS ARE EQUITABLE, NOT LEGAL, IN NATURE, THIS COURT HAS ALREADY RULED ON THE LEGAL ISSUES IMPLICATED IN POINT II OF THE PETITION

Tischmann asserts that this Court should now decide whether ERISA permits or requires a jury trial in actions challenging benefit decisions. Such a request is superfluous in light of this Court's prior holdings that equitable issues are not for the jury's consideration. As Tischmann does not challenge the factual determination made below that the ITTSESPP is an employee benefit welfare plan under ERISA, he cannot now claim an alleged right to a jury trial for a claim which has been determined to be equitable in nature.

Tischmann attempts to avoid the *res judicata* implications of his failure to challenge the factual determination that the ITTSESPP is an ERISA plan by resort to distinctions without a difference.[5] Tischmann's lengthy analysis of the alleged differences between trust instruments and plan instruments presents no issue for this Court's consideration given the prior and unchallenged determination that the ITTSESPP is a plan under ERISA and thus an equitable construct. Under either scenario, the effect of the Plan is equitable regardless of the

5. Indeed, Tischmann provides no support for his assertion that the plan instrument is any less of an employee benefit welfare plan merely because of Tischmann's continued assertions that it is a mere contract.

semantics of its characterization, and it is respectfully submitted that Petitioner raises no issues for this Court's consideration with this argument.

CONCLUSION

For the reasons set forth above, Respondent, ITT Sheraton Corporation, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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